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IN THE

United States Supreme Court

WILLIAM CRAWFORD, *et al.*,
Petitioners,

– v. –

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

– v. –

TODD ROKITA, *et al.*,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals for the Seventh Circuit

BRIEF OF THE LEAGUE OF WOMEN VOTERS OF INDIANA, INC., THE LEAGUE OF WOMEN VOTERS OF INDIANAPOLIS, INC. AND THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICI CURIAE* SUPPORTING PETITIONERS [INDIVIDUAL INDIANA VOTERS]

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INTEREST OF THE *AMICI CURIAE*[1]

> *"The League of Women Voters, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy."*
>
> Mission Statement,
> League of Women Voters of the United States

The League of Women Voters of the United States was founded on the belief that the right to vote is an integral component of what it means to be a citizen. In February 1919, at the National American Woman Suffrage Association's Fiftieth convention, Carrie Chapman Catt proposed to create a "league of women voters to finish the fight [for getting women the vote] and to aid in the reconstruction of our nation." Six months prior to the ratification of the Nineteenth Amendment, which granted women the right to vote, the League of Women Voters of the United States was born. It has worked for many years to encourage participation by all citizens in

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[1] The parties have given blanket consents to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Special thanks is extended to Troy D. Liggett, Catherine A. Clements and John T. Schlafer, 2009 J.D. Candidates, Indiana University School of Law—Bloomington, for their assistance.

the electoral process, and it has worked to facilitate the casting of ballots that will be counted.

The League is organized in more than 850 communities and in every State, with more than 150,000 members and supporters nationwide. The League of Women Voters of Indiana, with more than 1100 members and eighteen local organizations including the League of Women Voters of Indianapolis, also has a long history of working for citizen participation in government. (The three League of Women Voters entities appearing as *amici curiae* are referred to collectively as "the League.") The League remains a nonpartisan, political, grassroots organization that is directed by its members, who work to provide voters, without regard to political affiliation, with resources and information in support of the League's objective—to facilitate the exercise of the constitutional right to vote. The League has evolved from an organization focused upon the needs of women and the training of women to participate in the democratic and electoral processes to an organization concerned with the education of all voters, ensuring that democracy works for all citizens.

The League is deeply concerned that the current version of the Indiana Voter ID Law[2] unconstitutionally burdens the individual's right to vote.

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[2] As used herein, "Voter ID Law" refers to Ind. Sen. Enrolled Act 483, 2005 Ind. Legis. Serv. 109-2005 (codified at Ind. Code §§ 3-5-2-40.5; 3-10-1-7.2; 3-11-8-25; 9-24-16-10; as well as scattered sections of Ind. Code § 3-11-8, *et seq.* and Ind. Code § 3-11.7, *et seq*).

SUMMARY OF THE ARGUMENT

The right of an individual citizen to vote is a personal right. *United States v. Bathgate*, 246 U.S. 220, 227 (1918). Although the Indiana voters who are personally burdened by the Voter ID Law may be a minority, the number of voters burdened does not determine whether an individual's fundamental right to vote has been impermissibly infringed. The focus of constitutional inquiry is correctly on the burdens to a given individual, and not on the raw number of people burdened.

Because the litigation over the Voter ID Law commenced before the law's implementation, little evidence of how the law actually impacted individual voters was available to the District Court prior to its grant of summary judgment. The League, as *amici curiae*, presents the actual experiences of Indiana voters, who, although not parties to the action, exemplify the manner in which the Voter ID Law burdens the exercise by Indiana citizens of their fundamental right to vote. The League believes that these interferences require finding the Voter ID Law unconstitutional, or alternatively, vacating the decision of the Seventh Circuit and remanding to the District Court for further proceedings.

There are two basic infirmities presented by these stories. First, the Voter ID Law unconstitutionally burdens Indiana voters in a number of ways. As the Seventh Circuit's majority opinion recognized, *see Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), the Voter ID Law will prevent some Indiana voters from voting; indeed, as set

forth below, it has done so. Indiana voters without photo identification or with photo identification deemed to be inadequate are shuttled into a costly and burdensome "provisional" ballot process that requires them to make a separate appearance before the county election board to have their votes counted. Ind. Code § 3-11.7-5-2.5.[3] Elderly and disabled voters, unable to get proof of identification, are required to cast absentee ballots despite desiring to vote in person.

Second, the Voter ID Law vests unfettered discretion in the polling officials—who are political appointees—to challenge a voter's right to vote. The Voter ID Law requirements that the ID contain a "conform[ing]" name and a photographic likeness of the voter are particularly discretionary in their practical application, yet the Voter ID Law does not provide the constitutionally required limitations on that discretion, nor indeed any guidelines for its exercise at all. An election worker's decision to send a prospective voter through the provisional ballot process is not subject to an Election Day appeal, making any subsequent oversight or review an inadequate remedy to the burden imposed on the voter. The individuals described in Point II either have already been forced to cast a provisional ballot, or have a substantial risk of having to do so, as a result of an impermissibly unguided discretionary determination by an election worker.

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[3] Because the circuit court clerk is a member of the county election board, *see* Ind. Code § 3-6-5-2, all references to the county election board herein should be read to include the circuit court clerk.

ARGUMENT

POINT I

THE VOTER ID LAW SUBSTANTIALLY BURDENS THE EXERCISE OF INDIANA CITIZENS' CONSTITUTIONALLY PROTECTED, PERSONAL RIGHT TO VOTE

The Voter ID Law imposes upon a voter the affirmative obligation to present proof of identification[4] issued by the State of Indiana or the United States bearing a "conform[ing]" name and a photo of the voter. Ind. Code § 3-5-2-40.5. If the polling officials reviewing the identification find that it fails to satisfy the Voter ID Law, then the voter is required to cast a provisional ballot. *Id.* § 3-11-8-25.1(c),(d). A provisional ballot is not counted unless the voter

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[4] Under the Voter ID Law, "proof of identification" must satisfy all of the following:

> (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
>
> (2) The document shows a photograph of the individual to whom the document was issued.
>
> (3) The document includes an expiration date, and the document:
>
> (A) is not expired; or
>
> (B) expired after the date of the most recent general election.
>
> (4) The document was issued by the United States or the state of Indiana.

Ind. Code § 3-5-2-40.5.

subsequently appears before the county election board in the ten days following Election Day and takes the steps necessary to prove the voter is who she claims to be. *Id.* §§ 3-11.7-5-1(b), -2.5. The provisional ballot is counted only if the county election board is satisfied with the voter's proof of identification, or if the voter signs an affidavit swearing indigency or a religious objection to having a photograph taken. *Id.* § 3-11.7-5-2.5(d).

The Seventh Circuit Court's rejection of the challenge to the Voter ID Law is based on the idea that presentation of proof of identification to vote cannot be an undue burden because there are so few who are likely to be affected by it. *See Crawford*, 472 F.3d at 952 ("The fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer."). This reasoning misunderstands the nature of the right to vote as it has long been defined by this Court. "The right to vote is personal," *Bathgate*, 246 U.S. at 227, and "a value in itself" not to be determined by "mathematically calculating [each individual voter's] power to determine the outcome of an election." *Bd. of Estimate v. Morris*, 489 U.S. 688, 698 (1989). Thus, the right to vote is decidedly not a group right; nor is the value of that right simply "instrumental," as the Seventh Circuit majority opined. *See Crawford*, 472 F.3d at 951.

Instead, as was recognized by Judge Wood in her dissent from the Seventh Circuit's denial of rehearing *en banc*:

> Voting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance. Even if only a single citizen is deprived completely of her right to vote—perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification—this is still a "severe" injury for that particular individual.

Crawford v. Marion County Election Bd., 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting from denial of reh'g en banc). Assessing whether the Voter ID Law unconstitutionally burdens the right to vote is not a matter of counting how many Indiana citizens might be affected, but rather of assessing the extent of those burdens on each individual herself.[5]

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[5] Because the constitutionality of the Voter ID Law is assessed by its effect on individual voters rather than its effects on the electoral system as a whole, the Seventh Circuit's contention that only "a few" Indiana voters will be deterred from voting, *see Crawford*, 472 F.3d at 952, is irrelevant. Nevertheless, even deterring small numbers of voters could be outcome-determinative in Indiana.

For example, in the recent November 6, 2007 election, there were several contests that may be determined by provisional ballots. *See, e.g.*, Nick Werner, *Few uncounted votes linger in Muncie mayoral election*, Muncie Star Press, Nov. 8, 2007, http://www.thestarpress.com/apps/pbcs.dll/article?AID=20077 11080349 ("McShurley's best and possibly only chance at earning votes is likely going to come from the provisional ballots . . . [t]he majority of [which] were challenged on the basis that the voter did not provide identification at the polls"); Ken de la Bastide, *Dems to seek recount*, Kokomo Tribune, Nov. 7, 2007,

The problem with the Voter ID Law is that the moment a voter is challenged, the burden to have that vote counted shifts to the voter, who is sometimes unable to shoulder that burden. The stories of individual citizens of Indiana presented below may be atypical of the experience of most Indiana voters. And yet, they are also not lone outliers. For each individual discussed herein, there are likely hundreds of Indiana citizens who either have confronted or will confront similar situations under the Voter ID Law. The experiences of these Indiana voters illustrate the burden imposed by the Voter ID Law. They tell the story of how—voter by voter—the Voter ID Law is unconstitutionally abridging a cherished and fundamental right.

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http://www.kokomotribune.com/archivesearch/local_story_311220528.html (recount sought in three council races); Marisa Kwiatkowski, *C.P. race still in doubt*, The Times, Nov. 8, 2007, http://nwi.com/articles/2007/11/08/news/lake_county/docc00dec547575de178625738d000c3b67.txt (with three vote difference, "totals [in Crown Point Indiana council race] include absentee ballots but do not count provisionals"); Tom Wyatt, *Candidate may seek recount*, Post-Tribune, Nov. 8, 2007, http://www.post-trib.com/news/640850,velexfolo.article; Barry William Walsh, *Race comes down to less than 1 percent*, Chronicle-Tribune, Nov. 7, 2007, http://chronicle-tribune.com/apps/pbcs.dll/article?AID=/20071107/NEWS01/71106039&SearchID=73298863724687; Benjamin Lanka, *9-term council veteran on bubble in Fort Wayne*, The Journal Gazette, Nov. 7, 2007, http://journalgazette.net/apps/pbcs.dll/article?AID=/20071107/ELECTION01/711070398 (with nine vote difference in council race "there were seven provisional ballots not counted in the total and a number of absentee ballots not counted because of questions on their validity").

A. 92-Year-Old Mary Wayne Montgomery Eble Is Physically Capable Of Voting In Person But Cannot Do So Because Of The Voter ID Law

Mary Wayne Montgomery Eble, an Indiana businesswoman who is 92 years old, wanted to cast her ballot in person in November 2006, as she has done most of her adult life. This time, however, she was not able to vote at the polls, simply because she lacked proof of identification.[6]

A few years ago, Ms. Eble suffered a vision loss and when she stopped driving, she did not renew her driver's license. She lives, as she has done nearly all of her life, on her family's farm outside of Rockport, Indiana, the county seat. Unfortunately, the Rockport branch of the Indiana Bureau of Motor Vehicles ("BMV") was one of many closed by the state. To get an Indiana identification card, Ms. Eble would have to go to the BMV branch in Dale, Indiana, approximately forty-five minutes away. The rural area in which Ms. Eble's farm is located does not have much in the way of transportation assistance for the elderly. There is one van that serves the elderly of the area and, as it is a rural area, there is no public transportation.

But before Ms. Eble could even visit the BMV in Dale, she would have to go to Rockport, Indiana, to get a certified record of her birth. It is a one-hour

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[6] Unless otherwise noted, the facts regarding the specific Indiana citizens mentioned herein are set forth at the League of Women Voters of Indiana web site, http://www.lwvin.org.

round trip to Rockport for Ms. Eble. Moreover, because she was born at home, Ms. Eble is not certain what records might be available to her.

Voting is important to Ms. Eble. Her mother, Judith Montgomery, was a suffragette who fought to secure the right to vote for her daughter. In the past, Ms. Eble would travel to her polling place in Hatfield, Indiana. Her granddaughter, Jennifer Byerly, works as an inspector in Rio, Indiana. After voting, Ms. Eble would go to the Hatfield Methodist Church for its fundraising luncheon held every general Election Day. For Ms. Eble, exercising her right to vote is part of a family tradition of participating in self-government.

Even though Indiana allows some of its citizens to vote through casting absentee ballots,[7] some people who qualify for absentee voting, like Ms. Eble, understandably prefer to vote in person. In-person voting allows a voter until Election Day to factor late-breaking news into her candidate selection. And it avoids the possibility that a ballot cast by mail could be stolen, lost or not delivered in time to be counted. But most importantly for many Indiana citizens

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[7] Under Indiana law, a voter must satisfy one of the following in order to vote absentee: (1) be absent from the county; (2) be absent from the precinct because of election day services; (3) be confined to residence because of illness or injury; (4) be disabled; (5) be elderly; (6) be a caregiver to one who is confined to residence because of illness or injury; (7) be scheduled to work for the entire twelve hours that polls are open; (8) have moved precincts prior to election day; (9) be prevented from voting for religious observance; (10) be in an address confidentiality program. Ind. Code § 3-11-10-24.

such as Ms. Eble, voting in person at the polling place affords an opportunity to participate as an active citizen in the community. And for those who are unable to interact much in society, the act of voting can be a great leveler—giving those with limitations the ability to contribute to the democratic process with vigor equal to that of other voters.

B. After Considerable Effort To Vote In Person In 2006, 78-Year-Old Navy Veteran Ray Wardell Had To Vote Provisionally in 2007

To vote in person in the November 2006 general election, 78-year old Ray Wardell needed to obtain valid proof of identification. He had neither an Indiana driver's license nor an identification card, so he took a cab to the nearest BMV branch to apply for an identification card. Because he did not have his birth certificate with him, BMV staff told Mr. Wardell that he could not get an Indiana identification card. Because his income was limited, Mr. Wardell, who had recently suffered two strokes, did not take a cab home from the BMV. Instead, he walked home with the aid of a walker.

Mr. Wardell could have substituted his Medicare card for a birth certificate, but the BMV did not share this fact with him. *See* Joseph Dits, *What's required at BMV for photo ID?; For seniors, there are alternatives to birth certificate*, South Bend Tribune, Nov. 5, 2006, at B1. Mr. Wardell later returned to the BMV and was given his identification card after presenting his Medicare card. He

then proceeded to vote in the November 2006 general election.

Two weeks before the November 2007 general election, however, Mr. Wardell was robbed of his wallet, which contained his money and his Indiana identification card. He got a replacement Medicare card, which he took to the BMV (via a motorized scooter this time) in order to obtain a new Indiana identification card. Mr. Wardell presented his Medicare card, just as he did before, but was again told by BMV staff that he needed a certified copy of his birth certificate, and he was not given a replacement identification card. Mr. Wardell, uncertain of the process to get a copy of his birth certificate, was unable to get everything done in time to vote a regular ballot in the November 2007 general election.

Mr. Wardell voted provisionally on November 6, 2007, and must now make a special trip to appear before the county election board if he wants his vote to be counted. Mr. Wardell is a veteran of the Korean War and served four years in the United States Navy. He served his country when it needed him, but to participate now in its elections, he is being forced to undertake a significant additional burden.

C. Kim Tilman, Mother Of Seven, Cannot Afford The Price Of Voting

Kim Tilman is a stay-at-home mother of seven children. Her husband is employed as a janitor and is the sole source of income for the family. Ms. Tilman's Michigan driver's license is not a valid form of identification under the Voter ID Law.

To vote, Ms. Tilman must get an Indiana driver's license or identification card, which means she must provide the BMV with a certified copy of her birth certificate, which she does not have. Because she was born in Michigan, she must obtain a copy of her birth certificate through the Michigan Vital Records Office, which charges a fee of $26.00.[8] Mich. Vital Records Office, *Application for a Certified Copy of a Michigan Birth Record*, available at http://www.michigan.gov/documents/birthapp_6360_7.pdf. The application states the process will take at least four weeks following the date the Michigan agency receives the request, but when Ms. Tilman spoke with a Michigan representative, she was told it would take eight weeks to receive a certified copy of her birth certificate. To expedite the process, Ms. Tilman would need to pay an additional $10.00. Once she has her birth certificate, Ms. Tilman could either apply for an Indiana identification card, which is provided without charge to persons without an Indiana license, *see* Ind. Code § 9-24-16-10, or she could pay $14.00 for an Indiana driver's license.[9] *See* Indiana Bureau of Motor Vehicles, *Dri-*

[8] If Ms. Tilman drives to Michigan and requests her birth certificate in person, there is a $10.00 additional charge to obtain it that same day.

[9] Whether Ms. Tilman could qualify for an Indiana identification card will depend upon how the BMV branch through which she applies interprets BMV regulations. *Cf.* Mike Westervelt, *Editor denied voting right, criticizes agency for law misinterpretation*, The Purdue Exponent, Nov. 9, 2007, http://www.purdueexponent.org/?module=article&story_id=8338 (student denied Indiana identification card because he held an out-of-state driver's license), and Point I.D., *infra*, discussing

ver License Charges, http://www.in.gov/bmv/fees/driverlicense.htm (discussion of Indiana fees).

Thus, the total cost of securing the identification required by Ms. Tilman to vote in Indiana would be between $26.00 and $50.00. To many, this may not seem like a prohibitive expense. But to persons such as Ms. Tilman, it may be the difference between being able to pay for a heating bill, a bus pass or a refill on prescription medicine—and not. For Ms. Tilman, it is simply an expense that her family cannot afford at this time, and she did not vote in 2007. Ms. Tilman hopes that she can afford to secure the necessary identification in time to register and vote in the 2008 presidential election.

Because of the Voter ID Law, Ms. Tilman did not register to vote because she lacked the proof of identification necessary to vote. Ms. Tilman did not understand that proof of identification is unnecessary to register to vote and that once registered, she can vote a provisional ballot. Her provisional ballot can then be counted if she takes the additional step of claiming indigency.

The Voter ID Law allows a voter who lacks proof of identification to cast a provisional ballot. *See* Ind. Code § 3-11.7-2-1(b). If Ms. Tilman does so, her ballot will be counted provided that she appears before the county election board and completes an affidavit claiming indigency. *See id.* § 3-11.7-5-2.5. Unfortunately, although the Voter ID Law does not

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Faye Buis-Ewing, who was given an Indiana identification card and allowed to keep her Florida driver's license.

appear to grant a county election board discretion to deny a claim of indigence, it also does not define what constitutes indigency and thus it does not provide her with guidance as to whether she is entitled to self-identify, under penalty of perjury, as indigent. Moreover, even if particular voters may accurately swear to their indigency under penalty of perjury, the process of having to appear before the circuit court clerk or the election board to attest to their indigence—on a weekday, during working hours—rather than attesting to indigence at the time of voting, erects additional unnecessary and burdensome hurdles to voting for those without the ability to pay for a state-issued ID.

D. Faye Buis-Ewing Had To Go To Extraordinary Lengths To Vote In 2006

Faye Buis-Ewing and her husband are retired and consider Indiana to be their home, even though they spend part of the year in Florida. Ms. Buis-Ewing has been a resident of the Lafayette, Indiana area for approximately fifty years. Her first husband died a few years ago, and she remarried. Because she spends a portion of the year in Florida, Ms. Buis-Ewing maintains a Florida driver's license for convenience.

Ms. Buis-Ewing did not attempt to vote in the primary election in May 2006, the first election in which the new Indiana Voter ID law was in effect, so she did not know about the new photo identification requirements. When she went to vote in November 2006, she discovered she lacked accept-

able identification. Although she could have cast a provisional ballot, she did not want to make a second trip to appear before the county election board. So Ms. Buis-Ewing decided to obtain an Indiana identification card—on Election Day.

She left the polling place and visited the BMV branch in West Lafayette, Indiana with her birth certificate and her new social security card bearing her married name, "Buis-Ewing." The birth certificate was not accepted because it did not bear the name "Buis-Ewing" and her social security card was not accepted as identification. The BMV told Ms. Buis-Ewing that she could alternatively use a utility bill or a mortgage tax bill in her name; however, the utility bills are in her husband's name and she does not receive a separate tax bill for the mortgage. Finally, upon the suggestion of the BMV staff, Ms. Buis-Ewing went to the Social Security Office and successfully obtained a statement verifying her identification.

With her verified statement in hand, Ms. Buis-Ewing returned to the BMV. Upon presentation of the verified statement of identification from the Social Security Office and her Social Security card, Ms. Buis-Ewing finally obtained her Indiana identification card. Four hours after beginning her quest for an Indiana identification card, she returned to her polling place to cast her ballot. The polling place workers were so impressed by her efforts that they gave her a standing ovation. She explained her diligence by saying that she did not want the Voter ID Law to take away her right to vote.

Fortunately for Ms. Buis-Ewing, she had the time to track down the necessary documentation, a means of transportation from office to office, the financial ability to pay for the cost of her travel from office to office and the wherewithal to understand the process. While Ms. Buis-Ewing's experience is illustrative of the type of burden the Voter ID Law imposes, her ability to overcome the burden is exceptional. Such burdens would likely have been too much for persons with fewer resources or less fortitude, thereby deterring them from exercising their fundamental right to vote.

E. Hundreds Of Amish and Mennonites In Indiana Are Faced With A Choice Between Exercising Their Religious Freedom And Their Right To Vote

Indiana provides for the issuance of photo-exempt identification cards and driver's licenses for those whose religion prohibits them from being photographed. *See* Indiana Bureau of Motor Vehicles, *Request for Photo Exempt License/Request for Photo Exempt Identification Card for Religious Reason*, available at http://www.in.gov/icpr/webfile/forms-div/45811.pdf. However, because this type of state identification lacks a photograph, a voter with a photo-exempt identification card or license fails to satisfy the Voter ID Law, from which she is not exempt. Such a voter must cast a provisional ballot and then, if the voter wants her vote counted, she must appear before the county election board and complete another affidavit stating that the voter

objects to being photographed for religious reasons. *See* Ind. Code § 3-11.7-5-2.5(c)(2)(B). All of this must be done by the voter during and after every election, despite having presented this same type of evidence to the BMV to satisfy the requirement to secure the photo-exempt identification or license in the first place.

There were 19,177 Old Amish Order adherents in 244 congregations in Indiana in 2000, and Indiana ranks third in total numbers of Amish, behind Pennsylvania (25,340) and Ohio (24,613). *See* Dale E. Jones, et al., Glenmary Research Center, *Religious Congregations & Membership in the United States 2000*, at 22 (2002). While it is estimated that less than 10% of all Amish vote, *see* Associated Press, *GOP Courts Amish in Swing States,* Aug. 5, 2004, http://www.msnbc.msn.com/id/5613947/, even that would translate into hundreds of voting age Amish in Indiana impacted by the Voter ID Law. Additionally, like the Amish, there are also Mennonites and other Christians who believe that a photograph is a "graven image," the production of which is prohibited by God. *See* Associated Press, *Mennonites Plan to Move Over Photo IDs,* Mar. 21, 2007, http://www.msnbc.msn.com/id/17725931/. *See also Quaring v. Peterson*, 728 F.2d 1121, 1125-27 (8th Cir. 1984) (holding photo requirement for driver's license placed unconstitutional burden on Christian woman), *aff'd by equally divided court sub nom. Jensen v. Quaring*, 469 U.S. 815 (1985).

Thus those Amish and Mennonites who have photo-exempt identification cards and who seek to

vote are improperly burdened because they must prove after every election that their religion prohibits them from being photographed. As with the indigency affidavit, there is no reason the affidavit regarding photo-exempt identification cannot be executed at the polling place on Election Day. Instead, those Amish and Mennonites who do not have mechanized transportation must make the trip to the county election board after each primary and general election. Moreover, Old Order Amish may be reluctant to take steps to assert their right to vote, such as appearing before the county election board or executing a sworn affidavit. Their value of "Gelassenheit," roughly meaning calmness or composure, often translates into an unwillingness to use the legal system to protect their rights. *See* Donald K. Graybill, *Negotiating with Caesar*, *in* The Amish and the State 3, 12-13 (Donald K. Graybill ed., 1993). The Mennonites have a similar reluctance to engage in formal legal disputes. *See* Mennonite Church USA, Historical Committee, *The Use of the Law: A Summary Statement,* (Adopted by the Mennonite Church General Assembly on Aug. 11-16, 1981), http://www.mcusa-archives.org/library/resolutions/law_1981.html. This makes Amish and Mennonites unlikely candidates for vigorously defending their right to vote in the face of election officials who tell them that their state-issued identification is inadequate.

POINT II

THE VOTER ID LAW IMPROPERLY AFFORDS ELECTION OFFICIALS AND APPOINTED CHALLENGERS UNFETTERED DISCRETION TO BURDEN INDIVIDUAL VOTERS IN THE EXERCISE OF THEIR RIGHT TO VOTE

The right to vote is a fundamental right protected by both the First and Fourteenth Amendments. *See Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (Fourteenth Amendment precludes state from limiting the right to vote in school board elections to property owners and those with school-age children); *Paul v. State of Ind. Election Bd.*, 743 F. Supp. 616, 623 (S.D. Ind. 1990) (noting Supreme Court case law establishing that right to vote is "at the heart" of the First Amendment's protection). This Court has long disapproved of laws vesting officials with unfettered discretion to burden the exercise of First Amendment rights. *See, e.g., Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (assembly and parade ordinance held unconstitutional because it lacked "narrowly drawn, reasonable and definite standards" guiding the responsible administrator (internal quotation marks omitted)); *id.* at n.10 ("[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."); *Cantwell v.*

Connecticut, 310 U.S. 296, 307 (1940) (overturning convictions arising from religious solicitations because "to condition the solicitation of aid for the perpetuation of religious views of systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution"). The Constitution requires that a law granting discretionary action must also assure that the exercise of discretion will be "appropriately confined." *Niemotko v. Maryland*, 340 U.S. 268, 280 (1951) (Frankfurter, J., concurring) (citing *Cox v. New Hampshire*, 312 U.S. 569 (1941)); *see also Forsyth County, Georgia*, 505 U.S. at 131 (a law involving the "appraisal of facts, the exercise of judgment and the forming of an opinion" by a state official risks "abridgment of our precious First Amendment freedoms").

While prospective voters who lack a proof of identification are to be automatically challenged by a member of the precinct election board, *see* Ind. Code § 3-11-8-25.1(c)(1), challenges to the adequacy of a prospective voter's proof of identification are effectively discretionary. The Voter ID Law requires, *inter alia*, that the proffered proof of identification bear a "name [that] *conforms* to the name in the individual's voter registration record" and "show[ ] a photograph *of the individual* to whom the document was issued." *Id.* § 3-5-2-40.5(1)-(2) (emphases added). The Voter ID Law does not define "conform[ ]" (much less resolve how a voter with several varia-

tions of her name should be treated) and it does not explain how the similarity or dissimilarity in likeness of the person pictured on the proof of identification to the prospective voter is to be determined.[10] Nor does the Voter ID Law require any specific training in the consistent application of these criteria. *See id.* § 3-6-6-40 (requiring only that precinct election officers be trained regarding access for disabled voters and voting systems in use in the county, and excusing this requirement where there is insufficient time to provide such training).

These discretionary determinations are made on Election Day at the polling place individually by

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[10] "Conform" can have alternative meanings that would yield contradictory results in the context of the Voter ID Law. For example, Merriam-Webster Online defines "conform" alternatively as "similar" or "identical." *See* http://www.m-w.com/dictionary/conform (last visited Nov. 9, 2007). The Indiana Election Division has encouraged use of a definition of "conform" that would include "common variations" of names, such as the use of common nicknames, initials and middle names (*e.g.*, "Robert John Crew," "Robert J. Crew," "Robert Crew," "R. John Crew," "Bob John Crew," "Bob J. Crew," "Bob Crew," "John Crew" and "J. Crew"). *See* Indiana Election Division Memorandum re: Photo ID Interpretations at 2, *available at* http://www.in.gov/sos/elections/pdfs/PhotoIDAdvisory_4_30_06.pdf. This guidance is of limited practical use—for example, it does not deal with spelling discrepancies, including the one that prevented Janice Tingley from voting in person in 2006, which is described below in Point II.A.1. Even so, the Election Division plays a purely advisory role and cannot require Indiana's 92 county election boards to interpret the Voter ID Law in a consistent manner. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 785-86 (S.D. Ind. 2006); Ind. Code § 3-6-6-40(c).

five appointees of the two major political parties. *See* Ind. Code §§ 3-6-6-1, -8 (appointment of three-person precinct election board); 3-6-7-1 (appointment of challengers, one per precinct from each major political party). Under Indiana Code § 3-11-8-25.1(c)(2), a precinct election board member evaluates whether the proof of identification provided by the prospective voter fails to satisfy one or more of the above criteria. Indiana Code §§ 3-11-8-20 and 3-11-8-21 govern the form of a challenge. *See also* 2007 Election Day Handbook at 21, *available at* http://www.in.gov/sos/elections/hava/pdf/EDH%20Primary%2007.pdf. That the precinct election board members and appointed challengers are subject to certain generalized legal requirements does not alter the inherently discretionary nature of their application of Section 3-5-2-40.5's criteria.[11]

The burdens imposed by the Voter ID Law detailed in Point I above can thus be triggered by the exercise of discretion at the polling place on Election Day by political appointees whose training (if any)

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[11] Precinct election board members are required to affirm that they will "faithfully and impartially discharge" their duties and they will "not knowingly permit any person to vote who is not qualified and will not knowingly refuse the vote of any qualified voter or cause any delay to any person offering to vote other than is necessary to procure satisfactory information of the qualification of that person as a voter." Ind. Code § 3-6-6-23(2), (3). By contrast, a challenger is simply required, when making a challenge, to affirm under penalties of perjury that the challenger is not making a false statement. *Id.* § 3-11-8-21(5). These requirements of course provide no standards for the application of the statutory criteria.

varies from county to county, and whose decisions to require prospective voters to cast provisional ballots are not subject to any meaningful guidance, oversight or review. This is, as Judge Evans noted in his dissent below, a recipe for political mischief. *See Crawford*, 472 F.3d at 955 (Evans, J., dissenting). Moreover, as set forth in the examples below, the impact of the unguided discretion provided in the Voter ID Law is not merely hypothetical but rather a very real concern to actual voters who have been or who risk being burdened with voting by provisional ballots.

A. The Voter ID Law Allows A Voter To Be Burdened With A Provisional Ballot Simply Because Of A Minor Misspelling Of His Or Her Name

The Voter ID Law's lack of any interpretive guidance concerning the meaning of the statutory term "conform" allows election officials to burden voters whose proofs of identification do not exactly match their name on the voting roll with a provisional ballot. The District Court suggested that differences involving missing or unneeded hyphens and spaces were mere "potential anomalies" that were likely "trivial." *Rokita*, 458 F. Supp. 2d at 836. This burden is not merely potential. The occurrence of trivial challenges has been acknowledged by the former chief election official of Marion County. Appendix to the Brief of the League of Women Voters as *Amici Curiae* (hereinafter "League Br. App.") 3-4, *Crawford v. Marion County Election Bd.*, 472 F.3d 949

(2007) (No. 06-2218, 06-2317). And, as the case of Janice Tingley makes clear, even a difference of one character in a name can prompt a challenge.

1. Janice Tingley Had To Vote Provisionally In The 2006 Election Because Her Last Name Was Misspelled By One Letter

When Janice Tingley tried to vote in the 2006 general election, she presented a proof of identification correctly showing her name as "Tingley." She was challenged and forced to cast a provisional ballot because her name on the voter registration record was spelled "Tengley." Thus, at least one election official believed that the difference between "Tingley" and "Tengley" was sufficiently significant for her proof of identification not to "conform" within the meaning of the Voter ID Law.

2. Tracy Heaton De Martinez, Kate Sweeney Bell And Cordelia Lewis-Burks Cannot Reliably Use Their Indiana Driver's Licenses To Vote Because They Contain Misspellings That Cannot Now Be Corrected

As is common elsewhere, Indiana citizens follow different conventions for family names, including the use of hyphenated and non-hyphenated composite family names. The apparent inability (or refusal) of the BMV to correct errors in names on driver's licenses, once issued, renders such licenses ineffective as proof of identification for purposes of avoiding the burdens of the Voter ID Law.

For example, as is common in certain Spanish-speaking cultures, when she married, Tracy Heaton de Martinez incorporated her maiden name and the name of her husband. While the Social Security Administration correctly noted this change, the BMV did not, instead eliminating the space between "de" and "Martinez" such that Ms. Heaton de Martinez received a driver's license bearing the name "TRACY HEATON DEMARTINEZ." When informed of its error, the BMV responded that it was unable to change her license. In contrast to her driver's license, the polling list identifies her as "TRACY HEATON DE MARTINEZ." League Br. App. 5-6. Because the name on her Indiana driver's license might well be seen as not "conform[ing]" to that on the voter list (even using the Indiana Election Division's guidance for defining the term "conform"), Ms. Heaton de Martinez's possession of a proof of identification cannot ensure that she can vote without being forced to cast a provisional ballot.

Similarly, Kate Sweeney Bell is incorrectly identified on her Indiana driver's license as "KATE E. SWEENEY-BELL," although Ms. Bell's legal name is not hyphenated. Like Ms. Heaton de Martinez, Ms. Bell has asked the BMV on more than one occasion to correct the error, but to no avail. Ms. Bell's name on her voter registration card appears as "KATHERINE E. SWEENEY BELL." League Br. App. 7-8. Without the hyphen, her name on the voter registration record may be seen by an election official or challenger as not "conform[ing]," strictly speaking, to the name on her driver's license, thus requiring a provisional ballot.

By contrast, following her marriage in 1999, Cordelia Lewis adopted a hyphenated last name and became Cordelia Lewis-Burks. The full name listed on Ms. Lewis-Burks's driver's license is correct. The name on her voter registration record, however, is "CORDELIA LEWIS BURKS." Although, as explained below, Indiana law allows a voter whose name has changed to correct his or her name on the voter registration record on Election Day, *see* Ind. Code § 3-7-41-2, Ms. Lewis-Burks nevertheless faces a possible challenge under the Voter ID Law even if she should change her name on the voter registration record.

B. The Voter ID Law Additionally Burdens Persons With Recent Name Changes

Although the Indiana Code allows voters to change their names on the voter registration record in the polling place on Election Day,[12] the ambiguity concerning the meaning of "conform" permits such voters' correction of their voting record to result in their having to vote by provisional ballot. The Indiana Election Division recognizes that whether a voter will have to vote a provisional ballot is for each precinct election board member and challenger

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[12] The Indiana Code provides:

> A voter who wishes to indicate that the voter's name has changed may also write the necessary information concerning the name change on the voter registration record under IC 3-11-8-25.1 before the person receives a ballot. The person may then vote if otherwise qualified.

Ind. Code § 3-7-41-2.

to determine. *See* League Br. App. 1-2. The unequal application of such discretion in seemingly indistinguishable cases is already apparent, as the contrasting experiences of Karen Webster and Anne Riciardelli illustrate.

1. Karen Webster's Provisional Ballot Was Not Counted Because She Did Not Appear Before The County Election Board

Karen Webster was married in October 2006 and sought to update her name information at the poll on Election Day a few weeks later in November 2006. Despite her fourteen-year history of voting at the same polling place in Marion County, as well as her presentation of her marriage certificate and new driver's license (each bearing her married name) to precinct officials, Ms. Webster was told that she could not then change her name on the voter registration record. Ms. Webster voted a provisional ballot that day but her vote was ultimately not counted because she did not later appear before the Marion County Election Board.

2. Anne Riciardelli Was Required To Cast A Provisional Ballot But Was Told She Did Not Have To Appear Before The County Election Board To Have Her Ballot Counted

Marion County voter Anne Riciardelli, like Ms. Webster, changed her name shortly before the election of November 2006. Ms. Riciardelli arrived at

the polling place with all of her new identification and yet was required to cast a provisional ballot. Unlike Ms. Webster, however, Ms. Riciardelli was advised that it was unnecessary for her to go before the election board and so her vote was ultimately counted while Ms. Webster's ballot was not.

There is no explanation as to why Ms. Riciardelli's and Ms. Webster's provisional ballots received different treatment.[13]

C. The Voter ID Law Allows Challenges On The Basis Of Perceived Discrepancies Between The Physical Appearance Of The Individual And The Physical Descriptors And Photograph On The Proffered ID

As noted, the Voter ID Law requires the proof of identification to "show[ ] a photograph of the individual to whom the document was issued." Ind. Code § 3-5-2-40.5(2). Thus precinct election board

[13] The different treatment of ballots exemplifies the different treatment afforded to voters, either intentionally or unintentionally. Another example is that of Jonathan Groth, a principal employed by the Porter County School Corporation, which has issued him a photo ID. Mr. Groth was unable to use his photo ID as proof of identification in the May 2007 election because the poll workers concluded his photo ID did not satisfy the requirements of the Voter ID Law as it did not contain an expiration date and was not issued by the State of Indiana or the United States. However, in the November 2007 election, with different workers manning the poll, Mr. Groth was allowed to vote using his school photo ID, even though it was not issued by either the federal or state government and contained no expiration date.

members and challengers are permitted to decide whether they are satisfied that the photo on the proof of identification is a photo of the prospective voter. The Voter ID Law provides no guidance in this regard. While the burden imposed by non-"conform[ing]" names may be restricted to individuals who change their names or who have been unable to correct spelling errors, nearly every voter may find himself or herself burdened by a perceived change in appearance.

This is increasingly so given that most Indiana driver's licenses issued after December 31, 2005, expire and must be renewed every six years. *See, e.g.*, Ind. Code § 9-24-12-1(c). People often change their appearance, whether voluntarily or through natural processes, especially over a six-year period. They change hair color. They gain or lose weight. They grow facial hair or shave it off. They wear glasses or switch to contact lenses or vice versa or get laser surgery so that they no longer need glasses or contacts. They get sick and their physical appearance changes. The Voter ID Law makes such changes to appearance fair game for a challenge at the polling place.

For example, James E. Lingenfelter, Jr. is shown in the photo on his Indiana driver's license without any facial hair but he often sports a goatee and moustache. League Br. App. 13. Indianapolis voter Mary Ann Nowlin's driver's license states that she is a brunette but sometimes she is blonde; the weight on Ms. Nowlin's driver's license is approximately 50 pounds less than what Ms. Nowlin actually weighs;

and, she is wearing glasses in her driver's license photo but now nearly always wears contact lenses. League Br. App. 15-16. Cordelia Lewis-Burks is shown in her driver's license photo with red hair; however, her hair color is identified as "brown" on her driver's license. League Br. App. 10.

As is shown by each of the foregoing examples of typical changes in appearance, the Voter ID Law improperly affords discretion to election workers, including politically appointed challengers, to require almost any voter to cast a provisional ballot and to appear before the county election board within the next ten days for the simple reason that he now appears—whether objectively or even just subjectively to the election worker—different from the way he did when his proof of identification was issued. Indeed, since personal appearance can be a sensitive issue, the Voter ID Law may discourage some voters from even trying to vote simply to avoid what they perceive as the embarrassment or humiliation of having their current personal appearance evaluated against their likeness on their identification. The Constitution does not permit such arbitrariness to interfere with the fundamental right to vote.

CONCLUSION

For the foregoing reasons, the League respectfully requests that the Indiana Voter ID Law be declared unconstitutional under the First and Fourteenth Amendments. Alternatively, the League requests that the decision of the Seventh Circuit be vacated and the case remanded to the District Court for further proceedings.

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